

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JULIAN MATTHEW GORDON,

Defendant-Appellant.

UNPUBLISHED
October 26, 1999

No. 208893
Oakland Circuit Court
LC No. 97-153989 FH

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of one count of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and two counts of fourth-degree CSC, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). Defendant was sentenced to concurrent prison terms of six to fifteen years for the third-degree CSC conviction and one to two years each for the fourth-degree CSC convictions. We affirm.

Defendant, a clinical psychologist, first met the victim when he began counseling him. Defendant developed a close personal relationship with the victim, which included activities outside of their counseling sessions. The victim began to work for defendant at horse shows where defendant would show his horses. The victim traveled with defendant to these horse shows and spent the night with him in motel rooms. At trial, the victim testified that defendant masturbated him on several different occasions while the two were away at horse shows. The victim also testified that once, while he spent the weekend at defendant's house, defendant not only masturbated him, but also anally penetrated him with defendant's penis.

Defendant first argues that the trial court abused its discretion by admitting the testimony of one of defendant's former counseling patients and of defendant's former employer. The patient testified that he was counseled by defendant while he was a teenager and that he developed a close personal relationship with defendant. The patient also testified that he would sometimes spend the night at defendant's house and that, on one occasion, defendant wrestled with him and gripped his buttocks briefly. The patient did not believe that the touching was for purposes of sexual gratification. The patient ceased counseling with defendant shortly after this incident. Defendant's former employer

testified that she informed defendant that his personal relationship with the patient was inappropriate and that she fired defendant when he failed to heed her warnings.

Defendant contends that this evidence was used to demonstrate his alleged propensity to molest children and was inadmissible under MRE 404(b)(1). We disagree. The decision whether to admit other-acts evidence under MRE 404(b) is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person would conclude that there was no justification or excuse for the decision. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). We find no abuse of discretion in this case.

MRE 404(b)(1) governs the admission of other-acts evidence, and provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In order for other-acts evidence to be admissible, it must be offered for a proper purpose under MRE 404(b), it must be relevant under MRE 402, and its probative value must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *Crawford, supra* at 385; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *Rice, supra* at 439-440. If the evidence is admitted, the court may, upon request, give a limiting instruction to the jury, instructing it not to consider the evidence for any improper purposes. *VanderVliet, supra* at 55. The court did, in fact, provide a limiting instruction to the jury in the instant case.

We conclude that the prosecutor offered the testimony for a proper purpose. A proper purpose must be a "noncharacter" purpose; in other words, the prosecutor may not offer the evidence to demonstrate a propensity to commit the alleged crime. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). The prosecutor's stated purpose for the patient's testimony was to demonstrate a common scheme or plan, and the stated purpose for the former employer's testimony was to demonstrate defendant's state of mind. Mechanical recitation of a proper purpose is not enough; rather, the prosecutor must explain how the evidence relates to the recited purpose. *Crawford, supra* at 387. Here, the prosecutor explained that the testimony of defendant's former patient would demonstrate that defendant used similar techniques to win the trust and confidence of young teenage boys, and that he would develop a close personal relationship with them outside of the counseling context in order to spend unsupervised time with them and engage in inappropriate physical contact with them. The prosecutor also explained that, although the testimony of defendant's former employer did not relate to a specific act involving physical contact, it demonstrated defendant's state of

mind because he purposely engaged in personal relationships with teenage patients while he knew that doing so was professionally inappropriate. We conclude that the prosecutor adequately identified proper noncharacter purposes for the admission of the testimony.

We also conclude that the testimony was relevant to the recited purposes. Relevant evidence is defined by MRE 401 as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” This requires that the evidence be material and have probative value. *Crawford, supra* at 388. In order for evidence to be material, it must relate to a fact truly in issue. *Id.* Here, defendant denied that any sexual conduct ever took place, thus maintaining that his close personal relationship with the victim was purely innocent. The testimony of both the patient and the former employer related to whether the close relationship defendant developed with teenage boys was truly innocent or whether defendant pursued the relationship knowing that it was improper and intending for it to result in opportunities for physical contact. The requirement that the evidence have probative value is minimal—any tendency of the evidence to prove the alleged fact is sufficient. *Id.* at 389-390. Defendant argues that, because the wrestling incident with the patient was not sufficiently similar to the alleged masturbation and anal penetration with the victim, the evidence lacks sufficient probative value. However, in order to be relevant, the other-acts evidence need not possess a high level of similarity with the charged offense. *VanderVliet, supra* at 69-70. Rather, the inquiry must focus on whether the standard of relevance as set forth in MRE 401 was satisfied. We conclude that the testimony was relevant to demonstrate defendant’s common scheme or plan and state of mind. The evidence had probative value in demonstrating that defendant targeted young teenage boys whom he was counseling; pursued personal relationships with them outside of the counseling context, knowing that these relationships were inappropriate; invited the boys to spend unsupervised time with him, including overnight and weekend visits; and engaged in inappropriate physical contact with the boys.¹

Finally, we conclude that the probative value of the testimony was not substantially outweighed by its potential for unfair prejudice. We agree with defendant that the probative value of the testimony was not overly substantial. However, the testimony also had a relatively low danger of unfair prejudice. The patient testified that he did not believe that the touching of his buttocks while he was wrestling with defendant was for a sexual purpose. In fact, defense counsel stated during closing argument that he was glad that the testimony was introduced because it demonstrated that defendant was not a pedophile but was a good counselor, since he was willing to sacrifice his job to put this patient first by developing a close relationship with him. Moreover, the trial court correctly instructed the jury that it was not to consider the other-acts testimony as evidence of defendant’s bad character or propensity to molest children. In sum, although the evidence had limited probative value, this probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, we conclude that the trial court did not abuse its discretion by admitting the other-acts evidence.

Next, defendant argues that the trial court erred by determining that the victim’s counseling records were privileged. Defendant contends that the victim’s counseling records established that he was sent to counseling because of a lying problem. Defendant wished to introduce the records into evidence and to allow expert witnesses to testify regarding the victim’s psychological problems that

caused his lying problem. The trial court informed defendant that he would be allowed to cross-examine the victim and his mother using information obtained from the counseling records in order to impeach their credibility. Defense counsel agreed to this procedure and also agreed not to introduce expert testimony regarding the victim's psychological problems that may cause lying. Therefore, by conceding this issue, defendant has failed to preserve this issue for appellate review. *Dep't of Transportation v Pichalski*, 168 Mich App 712, 722; 425 NW2d 145 (1988).

In order to avoid forfeiture of this unpreserved issue, defendant must demonstrate plain error that was outcome-determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). We conclude that defendant has failed to meet this burden and has accordingly forfeited review of this issue. Defendant was able to effectively cross-examine witnesses and impeach their credibility on the basis of information contained in the records, thus affording him his right to confrontation. See *People v Adamski*, 198 Mich App 133, 137-140; 497 NW2d 546 (1993) (holding that absolute privilege denied the defendant his right to effectively cross-examine witnesses). Additionally, "[i]t is well established that an expert may not render an opinion or assessment as to the veracity of a complaining witness in a criminal sexual conduct case." *People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1988). We also reject defendant's contention that not allowing the jury to "see and touch" the records was prejudicial. Therefore, we decline to review this issue further.

Defendant next argues that the trial court abused its discretion by denying his motion for new trial based on these alleged errors. We review the trial court's decision whether to grant a motion for new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Defendant cites no authority for his argument on this issue, and merely argues that the trial court abused its discretion because it failed to correct its errors when given an opportunity to do so. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, we conclude that the trial court did not err in admitting the other-acts evidence and that the trial court's ruling regarding the victim's counseling records did not prejudice defendant. Therefore, the trial court did not abuse its discretion in denying defendant's motion for new trial.

Next, defendant argues that he was denied the effective assistance of counsel. Because defendant failed to establish a testimonial record in the trial court regarding this claim, our review is limited to mistakes that are apparent from the existing record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To justify reversal, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate that counsel's performance was deficient, "a defendant must also overcome the presumption that the challenged action was trial strategy." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). To demonstrate prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

We conclude that defendant has failed to demonstrate that he was denied the effective assistance of counsel. Defendant claims that counsel was ineffective by failing to file a written response to the prosecutor's notice of intent to seek admission of other-acts evidence, by failing to move for a mistrial after defendant's former patient testified, by failing to adequately argue for the admission of the victim's counseling records, and by failing to prevent the prosecutor from questioning defense character witnesses about defendant's termination from employment. However, defendant has not demonstrated prejudice resulting from these alleged errors. Defense counsel orally argued against the admission of the other-acts evidence. The testimony of defendant's former patient was admissible, and defendant was not prejudiced by the exclusion of the victim's counseling records since he was able to use information from those records to cross-examine witnesses. Additionally, defendant has failed to demonstrate a reasonable probability that the result would have been different had defense counsel prevented the prosecutor from questioning defense witnesses about testimony that the jury had already heard. Defendant also claims that counsel was ineffective by failing to object during the prosecutor's opening statement; however, defendant has failed to demonstrate that the lack of objection was not trial strategy. Finally, defendant claims that counsel was ineffective by failing to move to suppress items seized from defendant's home because they were the result of an illegal search. However, defendant presents no argument to support his contention that the search was illegal.

Defendant's final argument is that the cumulative effect of the foregoing errors denied him a fair trial. While it is possible that the cumulative effect of a number of errors may constitute error requiring reversal, only actual errors are aggregated to determine their cumulative effect. *Rice, supra* at 448. In this case, the trial court did not abuse its discretion in admitting other-acts testimony, defendant was allowed to use the victim's counseling records for cross-examination, and defendant was not denied the effective assistance of counsel. Defendant was not denied a fair trial. Thus, cumulative error is not a basis for reversal of defendant's valid convictions.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Talbot

/s/ Brian K. Zahra

¹ We are aware that, in *People v Sabin (On Remand)*, 236 Mich App 1, 9; ___ NW2d ___ (1999), a panel of this Court held that the other-acts evidence was not sufficiently relevant to show common scheme or plan where the victim accused the defendant of vaginal rape and the other-acts testimony involved repeated acts of oral molestation. However, the panel also noted that the other-acts evidence did not demonstrate that the defendant "had some unique, consistent pattern or scheme in approaching, overcoming, or treating his victims." *Id.* In the instant case, the testimony does indicate that defendant utilized a common pattern or scheme in approaching and overcoming his victims, as discussed above. Therefore, unlike the factual dissimilarity in *Sabin*, any physical dissimilarity between the acts of physical contact themselves do not render the other-acts evidence inadmissible in this case.